United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

74-2617

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UNTIED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

THE LUPARAR, JOHN SHUTTLE, Editor of Luparar, CRAIG MURRAY, Individually and on behalf of all others similarly situated, Plaintiffs-Appellees,

v.

R. KENT STONEMAN, Individually and as Commissioner of the Department of Corrections of the State of Vermont, MICHAEL MOEYKENS, Individually and as Acting Warden of the Vermont State Prison at Windsor, Vermont, Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF VERMONT

BRIEF OF PLAINTIFFS- APPELLEES

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Plaintiffs-Appellees,	)
v.	)
R. KENT STONEMAN, Individually and as Commissioner of the Department of Corrections of the State of Vermont; JULIUS MOEYKENS, Individually and as Acting Warden of the Vermont State Prison at Windsor, Vermont	)
Defendants-Appellants,	)

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UNITED STATES COURT OF APPEALS

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Department of Corrections of the
State of Vermont; JULIUS MOEYKENS,
Individually and as Acting Warden
of the Vermont State Prison at
Windsor, Vermont,

Defendants-Appellants,

1. QUESTIONS PRESENTED

1. Do the pleadings, depositions, affidavits and admissions on file fail to reveal a genuine issue over any material fact thereby justifying the district court in entering summary judgment for the plaintiff?

2. Did the district court properly hold that the standard of review set forth in Procunier v. Martinez, 94 S. Ct. 1800 (1974) apply to censorship of a prison newspaper?

II. STATEMENT OF THE CASE

This action for declaratory and injunctive relief was commennced on March 26, 1973. The suit challenged, on First Amendment grounds, the refusal of the Vermont Department of Corrections to permit distribution outside the prison of the January 1973 issue of the Luparar, an inmate publication. The suit also challenged the right of prison authorities to suppress issues of the newspaper due to content without a prior hearing and sought a declaration that a prison regulation prohibiting attacks on "personalities" was overbroad and vague in violation of the First Amendment.

On May 10, 1974, the defendants filed motions requesting dismissal of the complaint or, in the alternative, summary judgment. On June 8, 1974, plaintiffs filed a cross-motion for summary judgment. Materials before the court included the depositions of Commissioner Stoneman and Acting Warden Moeykens (App. 11, 76), prison regulations concerning visitation and inspection of mail (App. 208-209, 319-325), policies and guidelines regarding the Luparar (App. 202, 215-216, 219), several copies of the Luparar (App. 162-201, 224-304), an insurance policy maintained by the State of Vermont for the actions of its employees including libel, and admissions contained in correspondence from the Commissioner concerning publication of a prison newspaper in general (App. 203 and the Luparar in particular (App.220-222).

On September 30, 1974, the court issued an opinion and order granting plaintiffs' motion for summary judgment. The court enjoined the defendants to return the confiscated issue of the Luparar and permit it to be sent to the subscribers, and ordered the Department of Corrections to promulgate regulations governing future publication and to set up a review procedure. The decision is reported at 382 F. Supp. 495 (D. Vt. 1974).

On October 9, 1974, the defendants filed a motion in the alternative for new trial, re-hearing and re-argument. They also sought a stay of the court's judgment pending appeal. In conjunction with their application for stay, defendants included an affidavit signed by Commissioner Stoneman. This affidavit, referred to on pages 6 and 11 of defendants' brief, was not before the court prior to judgment.

On November 21, 1974, after hearing, the district court entered an Amended Opinion and Order denying defendants' motions for new trial and for a stay. (App. 395) The court modified its order to give the defendants flexibility in devising procedural safeguards to implement its decision. Defendants filed a Notice of Appeal to this court on November 27, 1974. (App. 399)

III. STATEMENT OF FACTS

Plaintiffs accept the statement of the case as set forth in the defendants' brief with one qualification.[1] Since the defendants refer only to Commissioner Stoneman's deposition, the statement of facts should be supplemented with the testimony of Acting Warden Moeykens.

According to Moeykens, the Department encouraged the inmates "to have a newspaper in whatever form that they wanted, and to have free expression of many types of things." (App. 23) He believed that a venture such as the Luparar would help to rehabilitate some of the men. (App.23) He saw the function of the newspaper as being informational and as giving the men another media of communication. (App.24)

While the majority of articles would be written by inmates, articles by staff of the Prison and the regional correctional centers as well as articles written by people on the outside were welcomed. (App.14) "(T)hey printed anything that came in, including letters from the Lieutenant Governor at one time." (App.14) The guidelines set up in 1971 pro ided, under the heading "Freedom of Expression", that "All articles submitted are subject to approval by the editorial staff." (app.28-29) Until January 1973, when the dispute arose, Dr. Hall, the staff librarian, or Mr. Tusler, the Supervisor of Education, would review the issues. (App.29) In

practice, this proved to be advisory only, a situation which the prison authorities tolerated. (App. 30-31) When Dr. Hall complained about an article, Warden Moeykens advised him, "We have not been successful as of late in getting any articles that we object to removed, so we might as well forget about it and let them print it." (App. 31)

Up until January 1973, there was no procedure for handling objections to particular articles. (App. 32) Warden Moeykens advised members of the staff who complained that "Look, we who work in public facilities must be ready to read all kinds of things about ourselves,' and so I sort of consoled them into letting things go." (App.32) This referred to personal attacks. (App.33) Warden Moeykens had become accustomed to personal attacks on himself and tolerated them. (App. 34) It was attacks on persons outside the institution that concerned him most. (App. 34) Commissioner Stoneman's office had advised him that "Well, you got (sic) to have big shoulders and you have to have tough skin when you are a public figure." (App. 40)

On January 5, Moeykens was shown the new issue of the Luparar. He thought it was getting "a little out of hand." (App. 42) Moeykens called the Commissioner who ordered that all copies be confiscated. (App.44) That night, Moeykens met with the Luparar

staff and told them that they could not mail it out to subscribers until the administration had had a chance to review it. (App. 44) By that night Moeykens knew that every resident had a copy of it. (App. 45) He did not take immediate steps to recover them. The following Monday they started rounding them up but only succeeded in recovering thirty seven out of five hundred copies. (App. 46) Following the distribution within the prison there was no disturbance (App. 46-47) and no instances of insubordination except for the refusal of the men to turn in their copies of the newspaper.

Warden Moeykens' original objection to the January edition of the Luparar related to three articles attacking a State's Attorney, a Public Defender and the Governor. (App. 48-50) It was on the basis of these articles that he complained to the Commissioner. (App. 54) He felt that they were uncomplimentary and violated the guideline against attacking personalities. (App.50) He felt that the facility which contributed financially to the paper should not be a party to uncomplimentary articles. (App. 50) But Moeykens agreed that the articles he found objectionable also contained discussion of issues. (App. 54) And, when asked whether it would be possible to write an article concerning the issue of whether a State's Attorney has covered up the involvement of prison personnel in an escape without involving his personality, Moeykens responded, "I guess it would be kind of difficult." (App.54)

After reading the January issue of the Luparar over the weekend, there was only one other article in the entire paper that he found objectionable: An article about Michael Donaghue, a newspaper reporter. (App. 55-56) Except for the four articles mentioned, all the other objections came from the Commissioner. (App. 56) On the following Monday, Commissioner Stoneman instructed Moeykens to strike out any article in the newspaper that referred to any personality, whether he was employed in or out of the prison. (App. 57)

With respect to the copies of the January edition of the Luparar which had been distributed within the prison, the warden was not concerned about security. (App. 69) The warden's objection was that the January issue did not comply with the November 1971 guideline about attacking personalities. (App. 70) He was also concerned that his employees were unhappy about articles about them appearing in the paper, (App.70) but he testified that the type of thing that appeared in the articles was the sort of thing that would get around by the prison grapevine anyway. (App. 72-73)

Commissioner Stoneman testified that in his opinion repeated attacks on personalities could create an atmosphere where security and rehabilitation were endangered. (See testimony excerpted in defendants' brief, p. 10). However, by letter dated January 29, 1973, setting forth the official position of the Department, the Commissioner made the following admissions:

"1. The State does not desire to censor outgoing inmate material destined for external publication.

2. The State can censor such material if it comes back into the prison, and if the material constitutes a "security" problem, as indicated in the existing mail regulations.

.....

6. The confiscated edition of the Luparar probably does not constitute a "security" problem, under the very rigid tests the courts have laid down. The issue in question would be admitted into the facility, if it were published verbatim externally."

(Letter reproduced at pages 220-222 of the Appendix)

IV. ARGUMENT

1. The District Court did not err in granting plaintiffs' motion for summary judgment as there was no genuine issue as to any material fact

The purpose of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is any genuine issue for trial. When a motion for summary judgment is made and supported with depositions, admissions on file, etc. it is incumbant upon the adverse party to "set forth specific facts showing that there is a genuine issue for trial." F.R.Civ.P. 56(e). The record in this case fails to disclose any

factual dispute between the parties with regard to any material issue in the case. Even if a factual dispute can be said to exist, the record is devoid of specific facts showing that a genuine issue exists as required by Rule 56(e).

(a) The Standard of Review

The defendants suggest that the standard to be applied is whether there is the "slightest doubt" that a genuine issue of fact exists. See Arnstein v. Porter, 154 F.2d 464, 468 (2d Cir. 1946); Doehler Metal Furniture Co. v. United States, 149 F. 2d 130, 135 (2d Cir. 1945). See generally, 6 J. Moore, Federal Practice, Para. 56.15 (1.-02) at 2292 (2d ed. 1974). However, following the 1964 amendment to Rule 56(e), the "slightest doubt" rule received a belated interment. Dressler v. M.V. Sandpiper, 331 F.2d 130 (2d Cir. 1964); United States v. Fair and Co., 342 F.2d 383, 385 (2d Cir. 1965); Miller v. General Outdoor Advertising Co., 337 F.2d 944, 948 (2d Cir. 1964); Waldron v. Cities Service Oil Co., 38 F.R.D. 170 (S.D.NY. 1965) aff'd. 361 F.2d 671 (2d Cir. 1966)aff'd sub nom. First National Bank of Arizona v. Cities Service Oil Co., 391 U.S. 253 (1968).

Defendants, on page 9 of their brief, quote from Dolgow v. Anderson, 438 F.2d 825 (2d Cir. 1970), to the effect that the slightest doubt rule still governs summary judgments in this Ciruit. The quoted sentence was an ambiguous reference by the majority to Judge

Frank's opinion in the Doehler case, supra., 438 F.2d at 830. But on petition for re-hearing, Judge Smith, the author of the majority opinion, said:

> "The petition for rehearing emphasizes the trend toward more liberal treatment of the trial court's summary judgment powers illustrated by our interpretation of amended Rule 56 in Dressler v. M.V. Sandpiper, 331 F.2d 130 (2d Cir. 1964) and American Manufacturers Mutual Ins. Co. v. American Broadcasting-Paramount Theatres, Inc., 388 F.2d 272 (2d Cir. 1967). We have no quarrel with this trend, and have not departed from it in our opinion here."
> Dolgow v. Anderson, 438 F.2d supra, at 833.

The court's review of Judge Coffrin's award of summary judgment should be governed by the principles expressed in American Manufacturers, supra:

> "....the law provides no magical talisman or compass that will serve as an unerring guide to determine when a material issue or fact is presented. As is so often true in the law, this is a matter of informed and proper reasoned judgment."
> 388 F.2d, supra, at 279.

(b) Discussion of the facts

For purposes of discussing whether the district court properly entered summary judgment, defendants have assumed that mass mailings are governed by Procunier v. Martinez, 94 S.Ct. 1800 (1974). Plaintiffs' discussion here is based on the same assumption.

Defendants find a material fact in the question of whether the prison newspaper would be likely to interfere with the legitimate governmental interests of security, order and rehabilitation. As

evidence that there is a genuine issue as to that fact, they point to the testimony of Commissioner Stoneman that the type of articles appearing in the January edition of the Luparar could create an atmosphere where security and rehabilitation are endangered. (Def. brief p. 10) This argument misses the mark because the primary question addressed by the court was whether a legitimate governmental interest existed for preventing distribution outside the prison. Luparar v. Stoneman, 382 F. Supp., supra, at 498-99.

In a Memorandum of Law dated June 9, 1974, the plaintiffs stated:

> "With respect to the January 1973 issue of the Luparar, distribution within the prison is not in dispute. Plaintiffs concede that despite attempts by the prison to prevent internal distribution, that issue of the Luparar did find its way to the inmates."
> Memorandum Opposing Defendants' Motion to Dismiss and in Support of Plaintiffs' Motion for Summary Judgment, June 9, 1974, p.2.

Warden Moeykens testified that the night distribution was halted, he knew that every resident had a copy. (App. 45) The District Court recognized outside distribution of the January edition of the Luparar as the issue, 382 F. Supp. at 497, and the defendants now confirm this in their brief. Def. brief pp. 17-18. It was in the context of outside distribution that the court examined the articles in question, 382 F. Supp. at 500, and held that sending the issue

to subscribers did not threaten valid penalogical interests as a matter of law.

Commissioner Stoneman never claimed that distribution outside the prison would affect security or rehabilitation. His stated concerns were fear of legislative retaliation and possible defamation lawsuits. (App. 89-90, 108-109, 114) These arguments were rejected by the district court as a matter of law.

It is true that the court held that the same standards governing distribution outside the prison also governed distribution inside the prison. 382 F. Supp. supra, at 499. But the fact that the issue in question had been distributed among all the inmates made it unnecessary to the decision to peruse the articles in connection with internal consumption. The court may well have intended to give the defendants some guidance in applying due process to future editions of the Luparar, but this did not make summary judgment as to the issues before him inappropriate.

Even if, as the defendants assume, the court held that, based upon its examination of the articles, distribution of the January 1973 edition of the Luparar to the inmates could not be halted, there is no genuine issue as to any material fact. Rule 56(e) requires that specific facts be set forth showing that there is a genuine issue for trial. Commissioner Stoneman's opinions expressed in his deposition constituted "undifferentiated fear or

apprehension of disturbance." Healy v. James, 408 U.S. 169 (1972); Cohen v. California, 91 S. Ct. 1780 (1971). Thus, he expressed concern that "this issue and some of the items contained in previous issues help create the kind of atmosphere where security was in danger and where rehabilitation was in danger." (App. 117-118) He also indicated that there was a Possibility "...in this kind of situation for the comments to be so strong that they can lead to the physical acts taking place...." (App. 120) The whole thrust of his remarks was that there was a potential for creating the kind of disturbance that might lead to a riot. This ephemoral testimony must be read in light of the Commissioner's admission, through his attorney, that "The issue in question would be admitted into the facility if it were published verbatim externally." (App. 221)(emphasis in original)

Essentially, the Commissioner has asked for Carte Blanche to censor articles and restrain publication without any controls. This, the district court ruled out as a matter of law under the principles announced in Procunier v. Martinez, supra. The Corrections Department can no more censor content on a disembodied fear of some future disturbance than it can lock up certain prisoners believed to be security risks because of some past unrelated conduct. Bowers v. Smith, 353 F. Supp. 1339 (D. Vt. 1972).

The defendants argue separately that the District Court erred in summarily trying the facts in granting summary judgment.

But they acknowledge that on a motion for summary judgment, the court can sift the facts to determine whether there is an issue to be tried. (Def. brief p. 13) That is precisely what Judge Coffrin did in this case.

Under Procunier v. Martinez, supra, the prison's legitimate interests are to maintain security and order and provide for the rehabilitation of prisoners. The record shows that the articles found objectionable by Moeykens all involved elected public officials. With respect to these public figures, Moeykens felt that unless the prison officials took action, they could be said to be supporting the attacks since the newspaper was subsidized. (App. 71) However, this reason is unrelated to any valid penalogical interest.

The defendants have expressed concern over possible libel actions. Warden Moeykens related one instance where there was a threat of suit, (App. 50-1) but no suit was ever brought and it is clear that the threat was levied at the inmate and not at the prison. (App.51) In any event, courts have not permitted censorship of school newspapers on that basis. Aside from insurance (which the state maintains), disclaimers [2] and possible defenses, [3] even if a suit were brought the plaintiff would have to meet one of the strictest standards of proof known to law to secure a verdict. New York Times v. Sullivan, 376 U.S. 254 (1964).

Moeykens, whom Commissioner Stoneman agreed was the man in charge of the prison, (App. 96) did not object to any article attacking prison personnel, including himself. While some of the employees were unhappy, (App. 70) Moeykens believed that it

was all part of the job. It was Commissioner Stoneman who instructed him to delete any article that referred to persoanalities or which were uncomplimentary to members of the staff. (App. 65) However, Procunier v. Martinez, supra, made clear that expression cannot be suppressed "to eliminate unflattering or unwelcome opinions or factually inaccurate statements." 94 S.Ct. at 1811.

It is undisputed that the January edition of the Luparar did find its way into the hands of the men. There were no disturbances and no instances of insubordination excepting the refusal to surrender the copies. (App. 46-47) Outside distribution could not possibly have affected the internal operation of the prison except insofar as the knowledge of prison officials and personnel that they were being publicly criticized might have an effect on their morale. But this is not a sufficient interest to justify the suppression of free speech. Cf. Fortune Society v. McGinnis, 319 F. Supp. 901, 904-905 (S.D.N.Y. 1970).

The record before the court also supported plaintiffs' view that the suppression of the Luparar had nothing to do with security. Warden Moeykens testified that the same information gets around by the prison grapevine and the Commissioner conceded that the January issue of the Luparar would have been permitted inside if it had been printed verbatim outside the prison. (App.220-222) The real basis for the suppression was to prevent it from reaching the public. Mr. Stoneman made this unmistakeably clear in his testimony when he said that he was concerned about adverse effects

from the legislature, which might include fiscal retaliation. (App. 114)

In Bazaar v. Fortune, 476 F.2d 570 (5th Cir. 1973), the University tried to defend its censorship of a campus newspaper by arguing that publication "would endanger the current public confidence and good will which the University of Mississippi now enjoys." The court held:

> "As a final word, we can only reiterate that speech cannot be stifled by the state merely because it would perhaps draw an adverse reaction from the majority of people, be they politicians or ordinary citizens, and newspapers. To come forth with such a rule would be to virtually read the First Amendment out of the Constitution and, thus, cost this nation one of its strongest tenets." Id. at 579.

A similar result was reached in Dickey v. Alabama State Board of Education, 273 F. Supp. 613 (M.D. Ala. 1967), where the court struck down a policy forbidding a school paper to publish editorials critical of the Governor or legislature. The policy was defended on the ground that the governor and legislature were the ultimate owners of the school and thereby controlled the purse strings. See also Gay Students Organization v. Bonner, 367 F. Supp. 1088 (D.N.H.) aff'd. 509 F.2d 652 (1st Cir. 1974). It is apparent that a rule prohibiting personal attacks out of fear of legislative reprisal is an impermissible infringement on First Amendment rights.

For the reasons stated, the court did not try material facts over which there was a genuine dispute: He simply applied the legal principles which he believed applicable to the facts disclosed by the record. He certainly did not presume knowledge of the conditions

at Windsor Prison, as alleged by the defendants. (Def. brief p. 14) It is significant that Procunier v. Martinez, supra, was decided by summary judgment. It was not argued there that the judge presumed knowledge of the conditions in the California prisons to enable it to hold that disparaging, contemptuous or potentially defamatory remarks in correspondence posed a threat to legitimate prison interests.

Defendants' next argument is that this is a matter involving complicated and important questions on an important public issue for which summary judgment is inappropriate. They refer to plaintiffs' statement in a memorandum of law that the case "involves some of the most difficult conceptual questions that can arise in First Amendment litigation,..." But this statement in no way detracts from resolution of those issues on summary judgment. The conceptual problems referred to are questions of law.

The district court recognized that questions concerning particular articles might arise in the future and for that reason ordered the defendants to establish a system of procedural due process. Acting on defendants' motion, the court entered a modified order to give them more latitude in devising a procedure that would be workable. Based on its reading of Procunier v. Martinez, supra, the court was clearly not about to accept the defendants' argument that it could censor distribution of the newspaper based upon the theoretical possibility that a long series of critical articles could create an atmosphere conducive to violence. If the court

erred in its application of Procunier to mass mailings, then that issue was properly reviewable in the Court of Appeals. But the court was clearly justified in finding on the record that there was no genuine issue as to any material fact.

Finally, even if the Commissioner's position that a valid penalogical interest is served by forbidding attacks on personalities, summary judgment was still proper in this case because the implementing regulation was vague and overbroad. In Procunier v. Martinez, supra, the court held:

> "Second, the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved. Thus a restriction on inmate correspondence that furthers an important or substantial interest of penal administration will nevertheless be invalid if its sweep is unnecessarily broad. This does not mean, of course, that prison administrators may be required to show with certainty that adverse consequences would flow from the failure to censor a particular letter. Some latitude in anticipating the probable consequences of allowing certain speech in a prison environment is essential to the proper discharge of an Administrator's duty. But any regulation or practice that restricts inmate correspondence must be generally necessary to protect one or more of the legitimate governmental interests identified above."
> 94 S. Ct. at 1811-1812.

The regulations sought to be enforced by the Commissioner permitted attacks on issues but not personalities, forbade "inflammatory" statements and "uncomplimentary" articles.

The worst guideline from the standpoint of overbreadth was the regulation that stated, "Editorials will attack issues and not personalities." It should be apparent that these are not mutually

exclusive categories. During their depositions, both Moeykens and Stoneman admitted that many articles that attacked a person also raised legitimate issues. To take but one example, defendant Stoneman admitted that an article dealing with nepotism would have been all right if it had not referred to the individuals by name. (App. 96-97) It should be obvious that in many cases the inability to criticize the individual will mean the issue cannot be addressed at all.

For essentially the same reason, the regulation is unconstitutionally vague: it may be impossible to deal with the issue without identifying the subject of the piece in some manner. For example, defendant Stoneman objected to a cartoon portraying Michael Toomey, the Chief of Security, as a hopeless alcoholic. Shortly before the January issue of the Luparar appeared, Toomey had been arrested on a charge of Driving While Intoxicated. Stoneman objected to the cartoon because, although it did not mention him by name, the individual had the initials "M.T." on his collar and a major's leaf on his shoulder. (App. 124-125) Plainly, the issue could not be raised without identifying the "personality" in some way.

It is clearly a matter of public interest that the Chief of Security of the State's maximum security facility, from which there had been numerous escapes,has an alcohol problem. Defendant Stoneman testified that that Toomey had committed himself to the Vermont

State Hospital in Waterbury for treatment due to his alcohol problem. (App. 127-128) By enforcing the "no attacks on personalities" rule, the Commissioner in effect made it impossible to discuss the subject. It may safely be assumed that in a prison of only 93 inmates, all the inmates know who is being referred to whether names are used or not. The primary effect of the rule against attacking personalities is to prevent the public from knowing so that corrective action can be taken.

The restriction on publishing "inflammatory" articles was interpreted by Moeykens to include, "Anything that would attack a person in such a manner as to maybe cast doubt upon his integrity." (App. 36) Commissioner Stoneman believed that calling a staff member or any other individual a "psychopath" was an inflammatory statement in the sense that, combined with a whole series of other items, it has the potential for creating a disturbance. (App. 99-100) The inability of the corrections officials to apply the term "inflammatory" in its accepted legal meaning of "creating an imminent danger of disruption" suggests that, as it stands, it too is vague. See McCleary v. Kelly, 376 F. Supp. 1186, 1189 (M.D. Pa. 1974)

The restriction against "uncomplimentary" articles is precisely the type of adjective struck down in Procunier v. Martinez, supra, as being too vague.

Articles in the January issue of the Luparar that the Commissioner objected to involved a wide range of issues concerning the administration of the prison and the functioning of the criminal

justice system in Vermont. A ban on attacking all personalities and writing uncomplimentary articles sweep far too broadly to meet the standard enunciated in Procunier v. Martinez, supra, and is facially invalid under the First and Fourteenth Amendments,

For the foregoing reasons, the court did not err in granting summary judgment to the plainiffs.

2. The district court properly held that the standards set forth in Procunier v. Martinez, supra, governing censorship of prisoner correspondence are applicable to a newspaper published by inmates

The defendants argue in the alternative that even if there was no genuine issue as to any material fact, the district court erred in applying the legal principles set forth in Procunier v. Martinez, supra, to the instant case. They begin their discussion by asserting that the plaintiffs' complaint did not raise the issue of in-prison distribution of a prison newspaper and claim that the plaintiffs agree with this conception of the lawsuit. Def. brief p. 17. This is inaccurate. What the plaintiffs agreed to, clearly shown by the quotation in footnote two of the defendants' brief, was that in-prison distribution of the January 1973 issue of the Luparar was not in dispute. This was because that issue had, in fact, been distributed to the inmates. (App. 45)

Both parties recognized that the question of whether the standards announced in Procunier v. Martinez, supra, would apply to in-prison distribution in the future was an issue in the case. This

is evidenced by Commissioner Stoneman's remarks expressing concern over discipline and rehabilitation. Obviously, these concerns would be relevant only if the Luparar was made available to the inmates. Moreover, even though the defendants filed motions for new trial, rehearing and reargument of the summary judgment quetsion, submitted memoranda of law and participated in a post-judgment hearing, never once did they suggest that the court had decided issues not contemplated by them to be in controversy. In fact, plaintiffs do not understand them to do so now. See defendant's brief, p. 17-18.

(a) In Procunier v. Martinez, supra, the Supreme Court intimated no view as to whether the standards governing prisoner correspondence would also apply to mass mailings

The defendants suggest that because the Supreme Court in Procunier v. Martinez, supra, indicated in a footnote that it was not deciding whether the same standards should apply to mass mailings, that it can be implied that the Supreme Court was expressing a view on the merits. Def. brief p. 18-19. This is specious.

Footnote 11 states:

> "Different considerations may come into play in the case of mass mailings. No such issue is raised on these facts, and we intimate no view as to its proper resolution."
> 94 S. Ct. at 1809.

It is important to recognize that footnote 11 was inserted by the Court in conjunction with its discussion of the source of the

claimed First Amendment rights and not, as the defendants contend, in conjunction with its discussion of what governmental interests will justify censorship of prisoner correspondence. 94 S. Ct. at 1809.[4/] The question left open by Procunier v. Martinez was whether the recipient of a mass mailing can be said to have a particularized interest in receiving the material, thereby triggering the First Amendment protection between author and addressee. This question was answered in the affirmative by the District Court, at least where the addressee is a subscriber to the newspaper, as was plaintiff Craig Murray. To extrapolate from footnote 11 that more stringent standards should govern mass mailings is without foundation.

(b) The subscribers to a prison newspaper have a 'particularized interest' in communicating with persons within the prison in addition to a right to hear and receive information protected by the First Amendment

The traditional reluctance of federal courts to intervene in problems of internal prison administration has undergone a steady erosion. This is the plain message of Procunier v. Martinez, in which the Court struck down restrictive mail regulations. The whole thrust of Procunier is that communications between prisoners and others is constitutionally protected expression, the essential question being the standard of review to be applied by the courts

so as to protect that interest without compromising the legitimate interests of the prison authorities.

Procunier dealt with correspondence between inmates and those who have a "particularized interest" interest in communicating with them. The Court found it unnecessary to consider the issue in terms of the inmates' First Amendment rights or the addressees' right to hear and receive information. In person to person correspondence, the Court held, the interests of both parties are inextricably meshed. Under those circumstances, the Court enunciated a two pronged standard: (1) Mail censorship is justified if it meets a substantial governmental interest unrelated to the suppression of expression. The identifiable governmental interests are the preservation of internal order and discipline, the maintenance of institutional security against escape or unauthorized entry, and the rehabilitation of prisoners. (2) The limitation on First Amendment freedoms must be no greater than is necessary or essential to the protection of the precise governmental interest involved. Applying these principles to private correspondence led the Court to strike down prohibitions against making statements deemed "defamatory," "derogatory," "disrespectful," or "belittling of the staff or the judicial system..." 94 S. Ct. at 1812.

Under Procunier, if subscribers of a prison newspaper stand on the same footing as non-prisoner correspondents, then the relevant principles of law are found not in "prisoner's rights" cases but in those dealing with governmental restrictions on the exercise of First Amendment rights. 94 S. Ct. at 1809.

In terms of the respective interests of the parties, it is difficult to differentiate between a correspondent and a subscriber. As the Court observed in Procunier, the act of communication is not accomplished by the act of writing the words. The thoughts sought to be transmitted are communicated only when read by the addressee. In both cases the interest given rise to by the First Amendment is "protection against unjustified governmental interference with the intended communication." 94 S. Ct. at 1809.

The Supreme Court did not define what it meant by "particularized interest." Although the Court used the example of an inmate writing to his wife, it is clear that the Court was not limiting the scope of its decision to those with a legal relationship to the inmate. In this connection, it is significant that the Vermont State Prison has an open mail policy permitting an unlimited number of letters addressed to persons of the inmate's choice. (App. 319) It would be difficult to argue that a subscriber to the newspaper has a lesser interest in receiving a communication than a correspondent chosen by the inmate. Since censorship of a prison newspaper "works a consequential restriction on the First and Fourteenth Amendment rights of those who are not prisoners," 94 S. Ct. at 1809, the standard of review set forth in Procunier should apply. Cf. McCleary v. Kelly, 376 F. Supp. 1186, 1190-92 (M.D. Pa. 1974)

Alternatively, the court should find a protectible interest in the community's right to hear and receive information. See Emerson, The System of Freedom of Expression 649 (1965); Note, The First Amendment and the Public Right to Information, 35 Univ.

Pitts. L. Rev. 93 (1973); Note, Freedom to Hear: A Political Justification of the First Amendment, 46 Wash. L. Rev. 311 (1971); Comment, Public and Press Rights of Access to Prisoners after Branzburg and Mandel, 82 Yale L. J. 1337, 1346-49; Case Note, 40 U. Cinn. L. Rev. 592 (1971).

In Lamont v. Postmaster General, 381 U.S. 301 (1965), Justice Brennan, concurring, explained the importance of the "right to hear":

> "It is true that the First Amendment contains no specific guarantee of access to publications. However, the protection of the Bill of Rights goes beyond the specific guarantees to protect from congressional abridgment those equally fundamental personal rights necessary to make the express guarantees fully meaningful....I think the right to receive publications is such a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers."
> 381 U.S. at 308.

The doctrine has been often reaffirmed, [5/] most recently in Kleindienst v. Mandel, 408 U.S. 753 (1972), although there the Executive's plenary power over aliens was held adequate to overrule that right.

In Fortune Society v. McGinnis, 319 F. Supp. 901, 905 (S.D.N.Y. 1970), the court said:

> "Free discussion of the problems of society is a cardinal principal of Americanism - it is part of our cherished heritage. Prison administration has been the subject of deep concern in contemporary society. Citizens, public groups and officials, as well as inmates, have been sharply critical of our correctional

> and penal practices and procedures. Various sectors of the community have charged correctional and prison administrators, and the courts as well, for administrative deficiencies and policies. Whether justified or not, prime responsibility for these alleged shortcomings have been attributed by many, including newspapers, to the courts and prison administrators. However distasteful or annoyed or sensitive those criticized may be by what they consider unfair criticism, half truths or information, it does not justify a ban of the publication carrying the alleged offending comments. Censorship is utterly foreign to our way of life; it smacks of dictatorship. Correctional and prison authorities, no less than the courts, are not above criticism, and certainly they possess no power of censorship simply because they have the power of prison discipline."

The articles objected to by Commissioner Stoneman dealt with, inter alia, wasteful expenditure of tax dollars in the prison, inadequate hospital care, incompetence of prison officials, violations of inmates' rights, and alleged misfeasances by elected public officials. These charges in many cases depended upon information exclusively within the control of prisoners and correctional personnel. They were clearly matters of public interest. To the extent that the Commissioner's decision to suppress distribution of the Luparar deprived subscribers of receiving that information, it violated their First Amendment rights.

The defendants argue that public personal attacks are more likely to polarize inmates and staff and could spur a person into committing a violent act. (Def. brief p. 20) But this goes to the separate question of whether particular articles can be censored in accordance with an appropriately drawn regulation under Procunier and not whether subscribers are on a different constitutional footing than correspondents. In fact, it is clear from Commissioner Stoneman's testimony that his real concerns over outside distribution stemmed from

fear of legislative retaliation and defamation suits, discussed infra.

(c) The cases relied upon by the district court involving censorship of college and secondary school newspapers are appropriate precedents for illuminating the legal issues presented in the instant case

In Section II of its opinion, the district court considered the question of whether the state, having permitted an inmate newspaper to be published, by state facilities and to be partially supported by state funds, can terminate the publication because it objects to its content. In holding that the state could not terminate publication or suppress circulation in a manner inconsistent with the First Amendment, the court relied on cases involving campus newspapers. See, e.g. Joyner v. Whiting, 477 F.2d 456 (4th Cir. 1973); Bazaar v. Fortune, 476 F.2d 570 (5th Cir. 1973) on rehearing en banc, 489 F.2d 225 (5th Cir 1973); Trujillo v. Love, 322 F. Supp. 1266 (D. Colo. 1971); Korn v. Elkins, 317 F. Supp. 138 (D. Md. 1970); Antonelli v. Hammond, 308 F. Supp. 1329 (D. Mass. 1970); Zucker v. Panitz, 299 F. Supp. 102 (S.D.N.Y. 1969); Dickey v. Alabama State Board of Educ., 273 F. Supp. 613 (M.D. Ala. 1967). cert. denied, 94 S.Ct. 2409 (1974)

Defendants argue that this reliance is misplaced pointing out that unlike prison, a campus is a marketplace of ideas designed to develop students into responsible citizens by exposing them to differing viewpoints. They rely on Wolff v. McDonnell, 94 S. Ct. 2963 (1974) for its description of a prison environment and conclude

"The prison atmosphere of possible retaliation is more than just a theoretical possibility, unlike a college campus...." They state further:

> "A prison is not a college campus and given a prison's specially charged atmosphere, the effects on prisoner and guard safety by a state funded, unregulated prison newspaper, is far-reaching and dangerous." (emphasis supplied) Defendant's brief p. 25

At the outset it should be noted that in Procunier v. Martinez, supra, the Supreme Court relied on school cases to fashion a standard for censorship in the prison context, even though it recognized that there were necessarily some differences. 94 S. Ct. at 1809-1810. Wolff, despite its dismal portrayal of prison life, does not undercut Procunier.

The only First Amendment issue before the Court in Wolff was the narrow one of "Whether letters determined or found to be from attorneys may be opened by prison authorities in the presence of the inmate and whether such mail must be delivered unopened if normal detection techniques fail to indicate contraband." 94 S. Ct. at 2984. In rejecting the inmates' First Amendment argument, the Court specifically acknowledged the distinction between censorship and inspection for contraband. The Court said:

> "To begin with, the constitutional status of the rights asserted, as applied in this situation, is far from clear. While First Amendment rights of correspondence with prisoners may protect against the censoring of inmate mail, when not necessary to protect legitimate governmental interests, see Procunier v. Martinez, ___U.S. ___(1974), this Court has not yet recognized First Amendment rights of prisoners in this

"context. Cf. Cruz v. Beto, supra, Cooper v. Pate, supra. Furthermore, freedom from censorship is not equivilant to freedom from inspection or perusal." Id. at 2984.

The language quoted by the defendants on page 24 of their brief to portray "a true portrait of life in prison" takes on a special meaning in the context of prison disciplinary proceedings. As the Court pointed out:

> "The reality is that disciplinary hearings and the imposition of disagreeable sanctions necessarily involve confrontations between inmates and authority and between inmates who are being disciplined and those who would charge or furnish evidence against them. Retaliation is more than a theoretical possibility; and the basic and unavoidable task of providing reasonable personal safety for guards and inmates may be at stake, to say nothing of the impact of disciplinary confrontations and the resulting escalation of personal antagonisms on the important aims of the correctional process.
>
> Indeed, it is pressed upon us that the proceedings to ascertain and sanction misconduct themselves play a major role in furthering the institutional goal of modifying the behavior and value systems of prison inmates sufficiently to permit them to live within the law when they are released."
> 94 S. Ct. at 2978 (emphasis supplied)

The defendants would transport this reasoning, root and branch, to censorship of prison newspapers. Commissioner Stoneman's affidavit, filed after Wolff was decided, is carefully couched in terms of retaliation against prisoners by guards. But his admission that such retaliation might occur "at some indefinite time" demonstrates that his concern is merely a "theoretical possibility."

Moreover, the Court was obviously aware in Procunier v. Martinez, supra, that a prison is "a closed, tightly controlled environment peopled by those who have chosen to violate the criminal law and who have been lawfully encarcerated for doing so." Wolff v. McDonnell, 94 S. Ct., supra, at 2977. Yet it upheld the right of prisoners to make the same kind of disparaging and critical remarks about prison personnel in private correspondence as are at issue here. While the Commissioner makes the unexplained assertion in his affidavit that the threat of retaliation "is greatly magnified when these attacks become public, and it is learned that the state is subsidizing them," there is nothing in Wolff to suggest that public reaction is a legitimate reason to curb criticism.

Nothing in the record or in any subsequent Supreme Court cases suggests that the district court's application of the principles developed in Procunier to this case was error. In fact, Wolff v. McDonnell, supra, expressly recognizes due process rights of prisoners in disciplinary cases even though the Court was alert to the security problems created by such hearings. 94 S. Ct., supra, at 2978. The review procedure ordered in this case is of an entirely different nature completely lacking the explosive quality of disciplinary proceedings.

The defendants' concern for personal attacks in unregulated prison newspapers is also ill-founded. Plaintiffs have never contended that the First Amendment requires the prison to let the inmates

the inmates violated guidelines set out in November 1971, prior to the time the Luparar commenced publication. (Defendants' brief p. 25) If the guidelines were violated, the argument goes, there is no First Amendment question at all, but only a question of breach of contract. (Def. brief p. 26) This argument assumes the basic question of whether the guidelines themselves were invalid. It is academic that the state could not condition the publication of a prison newspaper on the surrender of fundamental constitutional rights.

It has been repeatedly held that the grant of a governmental privilege cannot be burdened by unconstitutional conditions. In Sherbert v. Verner, 374 U.S. 398, 404 (1963), the Court said:

> "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege."

The cases involving suppression of campus newspapers are a fertile source for development of principles of constitutional adjudication with respect to prison papers.

In Joyner v. Whiting, 477 F.2d 456 (4th Cir. 1973), the President of North Carolina Central University withdrew financial support from the campus newspaper after publication of allegedly racist views. In considering the validity of the President's action, the court said:

> "Fortunately, we travel through well charted waters to determine whether the permanent denial of financial support to the newspaper

"because of its editorial policy abridged the freedom of the press....A college, acting "as the instrumentality of the State, may not restrict speech...simply because it finds the views expressed by any group to be abhorrent." Healy v. James, 408 U.S. 169, 180, 187, 92 S.Ct. 2338, 2345, 2349, 33 L.Ed. 2d 266 (1972); See Wright, The Constitution on Campus, 22 Vand. L.Rev. 1027, 1037 (1969) It may well be that a college need not establish a campus newspaper, or, if a paper has been established, the college may permanently discontinue publication for reasons wholly unrelated to the First Amendment. But if a college has a student newspaper, its publication cannot be suppressed because college officials dislike its editorial comment. (citations omitted) This rule is but a simple extension of the precept that freedom of expression may not be infringed by denying a privilege. Sherbert v. Verner, 374 U.S. 398, 404, 83 S.Ct. 1790, 10 L.Ed 2d 965 (1963).

In Antonelli v. Hammond, 308 F. Supp. 1329 (D. Mass. 1970), the court said:

"We are well beyond the belief that any manner of state regulation is permissible simply because it involves an activity which is a part of the University structure and is financed with funds controlled by the administration. The state is not necessarily the unrestrained master of what it creates and fosters. Thus, in cases concerning school supported publications or the use of school facilities the courts have refused to recognize as permissible any regulations infringing free speech when not shown to be necessarily related to the maintenance of order and discipline within the educational process. (case citations omitted)

.....

Having fostered a campus newspaper, the state may not impose arbitrary restrictions on the matter to be communicated."
308 F. Supp., supra, at 1337.

Statements to similar effect can be found in: American Civil Liberties Union of Virginia v. Radford College, 315 F. Supp. 893 (W.D.Va. 1970); Dickey v. Alabama State Board of Education, 273 F. Supp. 613 (M.D.Ala. 1967), vacated as moot, Troy State University v. Dickey, 402 F.2d 515 (5th Cir. 1968); Trujillo v. Love, 322 F. Supp. 1266, 1270 (D. Colo. 1971); Korn v. Elkins, 317 F. Supp. 138, 143 n. 5 (D.Md. 1970); Lee v. Board of Regents of State Colleges, 306 F. Supp. 1097 (W.D. Wis. 1969), aff'd. 441 F.2d 1257 (7th Cir. 1971); Wirta v. Alameda-Contra Costa Transit Dist., 68 Cal.2d 51, 64 Cal. Rptr. 430, 434 P.2d 982 (1967).

Under the doctrine of unconstitutional conditions, it makes no difference whether those conditions are imposed at the outset or at some later point in time. If a statute or ordinance is held unconstitutional, it is invalid from its inception. The issue in this case is whether the prohibition against attacking personalities and publishing "uncomplimentary" articles are invalid. Assuming that they are invalid, their destructive effect on First Amendment freedoms is the same whether imposed at the outset or later on. Stated otherwise, there are any number of legitimate reasons why the prison officials did not have to consent to a newspaper in the first place but, they could not, consistent with the First Amendment, condition that consent on the surrender of basic constitutional rights. See, Palmigiano v. Travisano, 317 F. Supp. 776, 792 (D.R.I. 1970), holding that consents to mail searches demanded of inmates were not valid waivers of constitutional rights.

(e) Censorship of a prison newspaper is not a matter concerning which the courts should defer to the alleged expertise of prison administrators

Defendants' next contend that censorship over a prison newspaper is a matter of internal prison management requiring judicial deference. They quote certain language from Procunier v. Martinez in support of their position. (Def. brief p. 29) But Procunier specifically rejected a non-interventionist approach in the very next paragraph where violations of fundamental rights are alleged:

> "But a policy of judicial restraint cannot encompass any failure to take cognizance of valid constitutional claims whether arising in a federal or state institution. When a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights. Johnson v. Avery, 393 U.S. 483, 486, 89 S.Ct. 747, 749, 21 L.Ed.2d 718 (1969). This is such a case. Although the district court found the regulations relating to prisoner mail deficient in several respects, the first and principal basis for its decision was the constitutional command of the First Amendment, as applied to the states by the Fourteenth Amendment."
> 94 S.Ct., supra, at 1807-1808.

Defendants cite Jones v. Rouse, 341 F. Supp. 1292 (M.D.Fla. 1972), for the proposition that it is within the discretion of prison authorities to determine what prisoner-penned articles may be circulated throughout the prison population. The plaintiff in Rouse made two allegations: one involved mail censorship, and the other press

censorship. The court's terse opinion was premised on the notion that only correspondence dealing with legal matters was constitutionally protected. That notion has little currency after Procunier v. Martinez. Moreover, the court flatly upheld the right of prison authorities to censor articles for publication, without addressing the question of what standards must govern that determination. Jones v. Rouse is a slender reed, indeed, upon which to rest a decision of constitutional magnitude.

(f) The existence of alternative means of expression does not insulate violations of constitutional rights in the chosen means from attack

Defendants argue that because there are alternatives open to the inmates for communication, they are under no obligation to subsidize a prison newspaper. Def. brief p. 30 et seq. They further argue that if they do so, they may place whatever conditions they wish on its content.

In positing their argument, the defendants recognize that inmates have the right to send out letters to the editor and manuscripts to private publishers. Their assertion that these are fully as effective as a newspaper is not only factually inaccurate but also not supported by the authorities.

In Zucker v. Panitz, 299 F. Supp. 102 (S.D.N.Y. 1969), some

students in a public high school sought to publish a paid advertisement in the school newspaper opposing the Vietnam war. In rejecting the school's argument that alternatives were open to the students, the Court said:

> "The argument that alternative modes of expression exist - for instance, conversations or armbands - thus permitting suppression of the chosen mode, is without merit and has been consistently disregarded by the courts. See, e.g. Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (Feb. 24, 1969); Wirta v. Alameda-Contra Costa Transit District, 68 Cal.2d 51, 64 Cal. Rptr. 430, 434 P.2d 982 (1967)."
>
> Zucker v. Panitz, 299 F. Supp., supra, at 105 n.5.

For one thing, the First Amendment specifically protects the freedom of the press, and not some undifferentiated right of expression. Freedom of speech and of the press are not fungible. Secondly, it is obvious that not all letters to the editor written by prisoners get published, nor do all manuscripts find their way into print. The alternatives put forward by the defendants are not viable alternatives at all.

Nor are the cases cited by the defendants apposite. In Lee v. Stynchcombe, 347 F. Supp. 1076 (N.D.Ga. 1972), a non-First Amendment case, an inmate had been offered counsel but had elected to proceed pro se. In rejecting his request for access to legal research materials, the court reasoned:

> "Once having offered petitioner the assistance considered to be essential to a fair trial, the government is under no obligation to provide petitioner with an inferior means of access to the courts." (emphasis supplied)
>
> Lee v. Stynchcombe, 347 F.2d, supra, at 1080.

The plaintiff in Gittlemacher v. Praese, 428 F.2d 1 (3d Cir. 1970), brought a civil rights action to force the state to provide a full time rabbi for two or three Jewish inmates. The district court granted summary judgment for the state. The Circuit did not reach the question of whether there was an affirmative obligation to provide a Jewish chaplain ("a concept which dangerously approaches the jealously guarded frontiers of the Establishment Clause") because the facts showed no religious discrimination had taken place. Gittlemacher v. Prasse, 428 F.2d, supra, at 4. Neither case lends any support to the argument advanced by the defendants.

The defendants also seek to buttress their argument by pointing out that the Vermont State Prison has adopted liberal rules governing correspondence, visiting and telephonic communication. The Supreme Court recently upheld regulations banning personal interviews with particular prison inmates by representatives of the news media. Pell v. Procunier, 94 S. Ct. 2800 (1974); Saxbe v. Washington Post Co., 94 S. Ct. 2811 (1974) Since the Court addressed the question of when alternative modes of communication will justify restrictions on First Amendment rights, an understanding of these cases is important.

In Pell, four California prison inmates and three professional journalists brought suit challenging a regulation which provided that "press and other media interviews with specific individual inmates will not be permitted." The journalists wanted to interview the three inmate-plaintiffs. In addition, a magazine editor wanted to discuss the possibility of publishing the fourth inmate's writings. The inmates asserted that the regulation violated their First Amendment rights and the journalists argued that the restriction on face-to-face interviews hindered their newsgathering ability and violated freedom of the press.

For purposes of its decision, the Court assumed "that under some circumstances the right of free speech includes a right to communicate a person's views to any willing listener,..." 94 S.Ct., supra, at 2804. The Court then proceeded to formulate a workable standard for reconciling First Amendment interests within a penalogical framework:

> "In the First Amendment context a corollary of this principle is that a prison inmate retains those First Amendment rights that are not inconsistent with his staus as a prisoner or with the legitimate penalogical objectives of the corrections system. Thus, challenges to prison restrictions that are asserted to inhibit First Amendment interests must be analyzed in terms of the legitimate policies and goals of the corrections system, to whose custody and care the prisoner has been committed in accordance with due process of law." 94 S. Ct., supra, at 2804.

The Court identified four such interests: deterrence of crime, protection of the public, rehabilitation and internal security. "It is in the light of these legitimate penal objectives that a court must assess challenges to prison regulations based on asserted constitutional rights of prisoners." 94 S.Ct., supra, at 2804.

In holding that available alternatives of communication were "relevant factors" to be considered in balancing First Amendment rights against legitimate governmental interests, the Court made unmistakeably clear that two factors were crucial to the decision.

First, petitioners' claims involved "the entry of outsiders into the prison for face-to-face contact with the inmates." Thus, the Court said:

> "In Procunier v. Martinez, supra, we could find no legitimate governmental interest to justify the substantial restrictions that had there been imposed on written communication by inmates. When, however, the question involves the entry of people into the prisons for face-to-face communication with inmates, it is obvious that institutional considerations, such as security and related administrative problems, as well as the accepted and legitimate policy objectives of the corrections system itself, require that some limitation be placed on such visitations. So long as reasonable and effective means of communication remain open and no discrimination in terms of content is involved, we believe that, in drawing such lines, "prison officials must be accorded great latitude." Cruz v. Beto, supra, at 321."
>
> Pell v. Procunier, 94 S.Ct., supra, at 2806.

The Court's passing reference to discrimination based on content is the second crucial distinguishing feature. The Court clearly

regarded the restriction on face-to-face interviews as a reasonable "time, place and manner" regulation. Addressing this question, the Court held:

> "So long as this restriction operates in a neutral fashion, without regard to the content of the expression, it falls within the "appropriate rules and regulations" to which "prisoners necessarily are subject," Cruz v. Beto, supra, at 321, and does not abridge any First Amendment freedoms retained by prison inmates."
> Pell v. Procunier, 94 S.Ct., supra, at 2807.

It is apparent that the principles enunciated in Pell have little application to the instant case. Plaintiffs do not seek access of any outsider into the prison. The issue is their right to send a publication outside the prison walls. Secondly, the action of the corrections' officials in suppressing distribution of the January 1973 issue of the Luparar had nothing whatever to do with the "time, place and manner" of distribution. It was a direct and heavy repression based on their disagreement with the content of the material contained therein. This is undisputed.

As Warden Moeykens' deposition reveals, none of the interests identified by the Supreme Court were extant here. The Commissioner's Attorney admitted that publication of the Luparar did not compromise security and that if it had been published outside, distribution would have been permitted within the prison. (App. 220-222) Moeykens testified that publishing the Luparar was probably of benefit to the men actually involved in its production in terms of rehabilitation. (App.23) Deterrence of crime and protection of the public are obviously immaterial in this context.

Another interest, asserted by the defendants, is to guard against the possibility of libel actions against the prison or its officials or members of the public. But this problem is no different from that confronting state colleges in the publication of student newspapers. The problem has been solved by the use of disclaimers. See Bazaar v. Fortune, 489 F.2d 225 (5th Cir. 1973)(en banc)

In any event the doctrine of sovereign immunity would protect the public treasury against suits brought against the prison. See 12 V.S.A. Sec. 5602(6)(excepting libel actions from the waiver of sovereign immunity in 12 V.S.A. Sec. 5601). In addition, the state is authorized by statute to purchase liability insurance to protect its employees against civil actions "arising from the performance of their duties and while engaged within the scope of their employment or official duties." 29 V.S.A. Sec. 1401-1403, 1406. The insurance policy maintained by the state insures against libel, slander and defamation actions up to $300,000 per occurrence. See Glens Falls Insurance Co. Policy No. L 4 36 58 73. Under these circumstances, any interest that the state may have in controlling the content of the Luparar is overborne by the plaintiffs' First Amendment rights.

For the reasons stated, plaintiffs believe that the possibility of libel actions against the state or its officials is more apparent than real. Assuming, arguendo, that this interest is significant, it is clear that the prison cannot suppress the articles based on content without affording a procedural mechanism for satisfying First Amendment Due Process. See Monaghan, First Amendment "Due Process," 83 Harv. L. Rev. 518 (1970).

Finally, even though in Pell the Supreme Court emphasized that the availability of alternative means of communication are "relevant factors" to be weighed. Pell is plainly the exception and not the rule. In Spence v. Washington, 94 S.Ct. 2727 (1974), a flag "misuse" case, the Court "rejected summarily" precisely the same argument. The defendant had placed a peace sign on an American flag with removeable tape. The state advanced several arguments to justify its statute prohibiting the affixing of any marks, symbols, insignae or inscriptions to the flag. The Court rejected out of hand the assertion that there are "thousands of other means available to (him) for the dissemination of his personal views...."

Pell does not represent a wholesale departure from the Court's prior teaching. Absent the special state interests that were identified in Pell and Procunier v. Martinez, there can be no justification for considering alternative modes of communication as relevant factors in the balancing process.

The defendants' reliance on Red Lion Broadcasting Co., Inc. v. FCC, 395 U.S. 367 (1969), upholding the fairness doctrine requiring the broadcast media to permit replies to personal attacks and political editorials, is misplaced. Aside from the obviously distinguishing feature that the number of broadcast frquencies are limited and strictly regulated by the government, the whole issue was to enable the person attacked to reply. The Department of Corrections does not contend that the distribution of the January 1973 issue of the Luparar was halted because opposing viewpoints were not allowed.

Indeed, Warden Moeykens testified that "...they printed anything that came in, including letters from the Lieutenant Governor at one time." (App. 24)

(g) The Department of Corrections, as an instrumentality of the State of Vermont, is governed by different principles than a private publisher

The defendants argue that the status of private newspapers relative to control over content are relevant to the instant case. (Def. brief p. 34) This argument is specious. Although there is a dearth of cases relating to publication of prison newspapers, there is an extensive body of caselaw dealing with college and secondary school papers. The analogy is apt since these papers are generally supported by University fees, run by students, and frequently print material deemed controversial by the administration.

In Bazaar v. Fortune, 476 F.2d 570 (5th Cir. 1973), the University of Mississippi refused to permit the publication and distribution of a magazine because two articles contained "four letter words." The issues, as framed by the court, were: "First, does the University here have the status of a private publisher with the right to choose what it will or will not publish. Secondly, if this special status cannot be afforded the University, has the University demonstrated sufficient "special circumstances" to justify censorship? 476 F.2d at 573.

In determining whether the University enjoyed the status of a private publisher, the court first considered its financial connection with the publication. However, the court's inquiry did not stop there:

> "Moreover, there is a more basic reason why the University cannot be accorded the omnipotent position it seeks. The University here is clearly an arm of the state and this single fact will always distinguish it from the purely private publisher as far as censorship rights are concerned. It seems a well-established rule that once a University recognizes a student activity which has elements of free expression, it can act to censor that expression only if it acts consistent with First Amendment constitutional guarantees." Id. at 574.

These statements were echoed in Zucker v. Panitz, supra, concerning the refusal of a public high school to print an anti-war advertisement in the school newspaper. The court said:

> "Different policy considerations govern whether a privately owned newspaper has an affirmative duty to grant access to its pages and whether a school newspaper has such a duty. For instance, there would be a thorny problem of finding state action, a problem which does not exist regarding a school newspaper." 299 F. Supp. at 105.

Where the critical issue is whether the institution seeking to exercise censorship is an instrumentality of the state, there is no basis on which to distinguish prisons from publicly financed schools.

(h) The suppression of the January 1973 edition of the Luparar constituted a prior restraint in violation of the First Amendment

Near v. Minnesota, 283 U.S. 697 (1931), was the provenance of the modern prior restraint doctrine. It has been described, in general terms, as follows:

> "The concept of prior restraint, roughly speaking, deals with official restrictions imposed upon speech or other forms of expression in advance of actual publication. Prior restraint is thus distinguished from subsequent punishment, which is a penalty imposed after the communication has been made as a punishment for having made it."
>
> .....
>
> In constitutional terms, the doctrine of prior restraint holds that the First Amendment forbids the federal government to impose any system of prior restraint with certain limited exceptions, in any area of expression that is within the boundaries of the Amendment." Emerson, The Doctrine of Prior Restraint, 20 Law and Contem. Prob. 648 (1955).

Near suggested three exceptions to the doctrine and there may be others within the prison context. Note, Prison Mail Censorship and the First Amendment, 81 Yale L.J. 87 (1971). However, it remains clear that prior restraints of expression carry a strong presumption against their constitutional validity and the government has a heavy burden to justify them. See New York Times v. United States, 403 U.S. 713 (1971).

It is clear that the issue of prior restraint must be considered in connection with the substantive and procedural aspects of the policy itself. In Eisner v. Stamford Board of Education, 440 F.2d 803, 806 (2d Cir. 1971), the court upheld a school regulation requiring prior submission of written matter distributed in school on the grounds that school authorities may reasonably protect against "substantial disruptions of or material interference with school activities." However, the court also made clear that the policy must be narrowly drawn so as to advance the social interests that justify it and not unduly restrict protected speech greater than is essential to the furtherance of those interests. This inquiry has both a procedural and a substantive dimension. The court must consider the criteria by which state officials are permitted to bar literature as well as the means by which the bar is effected. Eisner, 440 F.2d, supra, at 866.

The guidelines permitting attacks on issues but not personalities, the prohibition against "uncomplimentary" articles and enforcement of the rule against "inflammatory" articles (as that term was interpreted by the authorities) gave the prison officials unbridled discretion to censor any article that criticized staff or elected public officials. As such, it was substantively defective. With respect to procedure, there simply was none for screening articles until the district court ordered the defendants to formulate one. In part IV of its opinion, the district court held that such a procedure was constitutionally mandated and intimated the view that the sort of articles that appeared in the January

issue of the Luparar would not threaten legitimate governmental interests.

Defendants have not briefed the question of whether due process was required prior to suppression of particular issues. Apparently, defendants are content to accept the responsibility of providing a hearing for future editions if this Court sustains the lower court's holding that publication of a prisoner newspaper under the circumstances of this case warrants the protection of the First Amendment.

V. CONCLUSION

For the foregoing reasons, the Court should hold the principles of Procunier v. Martinez applicable to the instant case and uphold the district court's award of summary judgment to the plaintiffs.

Dated: April 20, 1975

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FOOTNOTES

1/ On page three of their brief, defendants' state that, "It had become apparent that the Luparar was attacking personalities and publishing potentially libelous and highly inflammatory articles." It should be clear that the characterization of the articles as "potentially libelous and highly inflammatory" were Commissioner Stoneman's.

2/ Bazaar v. Fortune, 489 F.2d 225 (5th Cir. 1973)(en banc)

3/ Truth and privilege would be possible defenses. Significantly, Warden Moeykens testified that the truth of what was said in the articles was beside the point, since he felt the prison should not be a party to this type of article. (App. 50) Assuming the prison can properly exclude libelous material from the Luparar, then due process and the First Amendment require that the defendants demonstrate that a particular article is libelous as a matter of Vermont law "and also unentitled to First Amendment protection as a matter of federal law." Trujillo v. Love, 322 F. Supp. 1266, 1269-70 (D. Colo. 1971); Scoville v. Board of Educ. of Joliet, 425 F.2d 10, 16 (7th Cir. 1970).

4/ The defendants would reverse the order of the inquiry, arguing that the special characteristics of the prison environment justify a less demanding standard of censorship and hence a dilution of First Amendment protections regardless of the relationship between correspondent and recipient. But Procunier v. Martinez makes clear that in determining what standard of review the prison may employ in censoring correspondence, it must first be determined whether the relationship triggers the full protection of the First Amendment.

It is an essential part of the balancing test that the relative strengths of the plaintiffs' claim for First Amendment protection and the defendants' claims based on legitimate penalogical interests be assessed.

5/ Red Lion Broadcasting Company v. FCC, 395 U.S. 367, 386-90 (1969); Stanley v. Georgia, 394 U.S. 557, 564 (1969); Lamont v. Postmaster General, 381 U.S. 301 (1965); Garrison v. Louisiana, 379 U.S. 64 (1964); Thomas v. Collins, 323 U.S. 516, 534 (1945); Martin v. City of Struthers, 319 U.S. 141, 143 (1943); Cf. Kleindienst v. Mandel, 92 S. Ct. 2576 (1972).

CERTIFICATE OF SERVICE

I, Richard S. Kohn, Esq. hereby certify that on the ____day of April I served two copies of the brief of the plaintiff-appellees on the defendants by placing same in the United States mail, first class postage prepaid and addressed to:

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